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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1854 70-309

COLONIAL PIPELINE COMPANY,
a corporation of the State of Delaware,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, LAW DIVISION (CRIMINAL), MIDDLESEX COUNTY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO.

COLONIAL PIPELINE COMPANY, a corporation of the State of Delaware,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, LAW DIVISION (CRIMINAL), MIDDLESEX COUNTY

Petitioner, Colonial Pipeline Company ("Colonial"), a corporation of the State of Delaware, with principal offices at 3390 Peachtree Road, N. E., Atlanta, Georgia 30326, respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of the State of New Jersey, Law Division (Criminal), Middlesex County, entered December 8, 1969 which judgment denied petitioner's motion to dismiss an indictment on the ground of double jeopardy. A copy of that judgment is appended as Appendix A hereto.

OPINION BELOW

The opinion of the Superior Court of the State of New Jersey, Law Division (Criminal), Middlesex County, has not been reported. A copy of that opinion is appended as Appendix B hereto.

JURISDICTION

The judgment of the Superior Court of the State of New Jersey, Law Division (Criminal), Middlesex County (Appendix A hereto), was entered December 8, 1969. Leave to appeal that judgment was denied by orders of the Superior Court of the State of New Jersey, Appellate Division, decided January 6, 1970 and filed January 7, 1970, and of the Supreme Court of the State of New Jersey entered March 22, 1971. Copies of those orders are appended as Appendix C and Appendix D hereto, respectively. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. The federal authorities having already tried petitioner for alleged violation of the New Jersey bribery statute, *N.J.S.* 2A:93-6 (by authority of 18 U.S.C. §1952), may New Jersey retry it under a virtually identical indictment for the same alleged violation of the identical statute by the same alleged conduct?

2. Should *Bartkus v. Illinois*, 359 U.S. 121 (1959), be expanded to permit New Jersey so to place petitioner again in jeopardy?

3. Should *Bartkus* be expressly overruled?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. V:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb. . . ."

U.S. Const., Amend. XIV:

> ". . . No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

18 U.S.C. §1952:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —
>
> • • •
>
> "(3) . . . promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in [subparagraph] . . . (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> "(b) As used in this section 'unlawful activity' means . . . (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

• • •

N.J.S. 2A:93-6:

> "Any person who directly or indirectly gives or receives, offers to give or receive, or promises to give or receive any money, real estate, service or thing of

> value as a bribe, present or reward to obtain, secure or procure any work, service, license, permission, approval or disapproval, or any other act or thing connected with or appertaining to any office or department of the government of the state or of any county, municipality or other politicial subdivision thereof, or of any public authority, is guilty of a misdemeanor."

N.J.S. 2A:85-7:

> "Any person found guilty of a crime which by any statute is declared to be a misdemeanor, and for which no punishment is specifically provided, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than 3 years, or both."

STATEMENT OF THE CASE [1]

Petitioner, Colonial Pipeline Company, is a defendant in two criminal actions, one federal and one state, both of which are still in progress, in both of which it is accused of the same alleged violations of the same New Jersey statute by the same acts.

The first criminal action, brought by the United States in the United States District Court for the District of New Jersey, accused Colonial of causing payments of money to be made to certain officials of the Township of Woodbridge, New Jersey, in violation of *N.J.S.* 2A:93-6, the New Jersey bribery statute. The federal indictment [2] was based upon 18 U.S.C. §1952 which, in pertinent part,

---

[1] Colonial joins in the Statement of the Case set forth in the Petitions for Writs of Certiorari filed on behalf of petitioners, Ben D. Leuty and Karl T. Feldman, and makes those statements a part of its Statement of the Case as if incorporated herein at length.

[2] Copies of the federal and state indictments are appended as Appendix D to Petition for Writ of Certiorari filed on behalf of petitioner, Ben D. Leuty.

provides federal penalties for persons who, with intent to violate a state bribery statute, use or cause others to use interstate facilities and thereafter commit the state bribery violation. The federal indictment charged Colonial with seven substantive counts based on seven alleged installment payments or attempted payments of two alleged bribes, and with two counts of conspiring to make those payments. Following a ten-week trial, Colonial was, on January 23, 1969, convicted of all counts, sentence was thereafter imposed and Colonial was fined a total of $90,000. On appeal, that conviction was reversed by the United States Court of Appeals for the Third Circuit on February 18, 1971 on the ground that the procedure utilized in the selection of the grand jury which returned the indictment was violative of federal law. On March 5, 1971, the federal prosecutor filed with the Third Circuit an application for rehearing *en banc*, which application is still pending before that Court without determination.

Two weeks after the federal verdict, a second criminal action was brought when the State of New Jersey carbon-copied the federal indictment [2] and indicted Colonial for allegedly committing the same violations of the same state statute by the same acts.[3] Colonial moved in the Superior Court, Middlesex County, for an order dismissing the state indictment on the grounds of double jeopardy. That motion was denied (Appendices A and B), and the Superior Court, Appellate Division (Appendix C) and the Supreme Court of New Jersey (Appendix D), both denied leave to appeal.

Colonial moved the Supreme Court of New Jersey for a stay of further state proceedings pending the filing

---

[3] Two substantive counts were omitted apparently because the New Jersey statute of limitations had run.

of a Petition for a Writ of Certiorari and thereafter until the final disposition of the matter by the United States Supreme Court. That application was denied but Colonial was granted a stay until May 17, 1971, on condition that an application for a further stay be filed with the Clerk of the United States Supreme Court by April 16, 1971 (Appendix E). Such application was timely made but denied by Mr. Justice Brennan on April 23, 1971 (Appendix F).

Thus, Colonial is about to undergo the ordeal of a second trial for the same alleged violations of the same New Jersey statute by the same alleged conduct as that which was involved in the initial federal trial. The state prosecutor is about to have the opportunity to try to convict Colonial on charges for which it has already been convicted and punished in the federal proceedings. It was to prevent this repeat performance of the earlier federal prosecution that Colonial moved to dismiss the state indictment on the ground of double jeopardy and took the further proceedings hereinabove outlined, all without securing the relief sought. This Petition ensued.

REASONS FOR GRANTING THE WRIT

In support of the within Petition, Colonial joins in the Reasons for Granting the Writ set forth in the Petitions for Writs of Certiorari filed on behalf of Petitioners, Ben D. Leuty and Karl T. Feldman, and makes those statements a part hereof as if set forth herein at length.

The state prosecutor is seeking a second chance to prosecute Colonial for the same alleged violations of the same New Jersey statute by the same alleged conduct. He is seeking to convict Colonial for the same alleged violations and alleged conspiracies to violate *N.J.S.* 2A:93-6

of which it has already been convicted. In doing so, he is seeking to vindicate the identical interests the federal prosecutor sought to vindicate rather than any different interests. There is no justification for permitting a defendant to be subject to multiple criminal prosecutions for the identical acts comprising the identical alleged offense.

CONCLUSION

For the foregoing reasons, petitioner prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

/s/ Frederic K. Becker
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Dated: June 18, 1971

APPENDIX A

Judgment of Law Division of Superior Court
(Filed December 8, 1969)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION
(CRIMINAL)
Nos 69-187, 188, 190

THE STATE OF NEW JERSEY,

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

This matter having been opened to the Court by various counsel representing all of the afore-mentioned defendants except Walter Zirpolo, and the State having been represented by Edward J. Dolan, Prosecutor of Middlesex County (J. Norris Harding, Assistant Prosecutor, appearing), and the Court having had an opportunity to consider the briefs and affidavits submitted as well as the oral arguments presented;

It is, on this eighth day of December, 1969, ORDERED and ADJUDGED that the motions made by respective counsel for all the defendants except defendant Walter Zirpolo, for dismissal of the above indictments, based upon double jeopardy and/or collateral estoppel, be and the same are hereby dismissed for the reasons fully stated in the court's oral opinion delivered in open court on October 31, 1969, as by the record will more fully appear.

Leon Gerofsky, A.J.S.C.

I hereby consent to the form of the within Order.

WILENTZ, GOLDMAN & SPITZER
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By WARREN W. WILENTZ

TOOLAN, ROMOND & BURGESS
Attorneys for Robert E. Jacks
By JOHN E. TOOLAN

SHANLEY & FISHER
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By THOMAS CAMPION

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By SIMON H. RIFKIND

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Attorneys for Karl T. Feldman
By ADRIAN FOLEY

VAN RIPER, BELMONT & VILLANUEVA
Attorneys for Gates Equipment Corp. and Gates Construction Corp.
By WALTER VAN RIPER

APPENDIX B

Oral Decision of Gerofsky, A.J.S.C.
(Filed October 31, 1969)

NEW JERSEY SUPERIOR COURT
MIDDLESEX COUNTY—LAW DIVISION
(CRIMINAL)
Nos 69-187, 188, 190

THE STATE OF NEW JERSEY,

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE COMPANY, KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORPORATION, BECHTEL CORPORATION, GATES CONSTRUCTION CORPORATION, GATES EQUIPMENT CORPORATION,

Defendants.

Middlesex County Court House
New Brunswick, New Jersey
October 31, 1969

Before:

Honorable Leon Gerofsky, A.J.S.C.

Appearances:

Edward J. Dolan, Prosecutor
By J. Norris Harding, Assistant Prosecutor
For the State.

Toolan, Romond & Burgess, Esqs.
By Arthur W. Burgess, Esq.
For Defendant Jacks.

Wilentz, Goldman & Spitzer, Esqs.
By Warren W. Wilentz, Esq.
For Defendant Colonial Pipeline.

Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison
By Simon H. Rifkind, Esq.,
For Defendant Leuty.

Pindar, McElroy, Connell, Foley & Geiser, Esqs.
By Adrian M. Foley, Jr., Esq.,
For Defendant Feldman.

Shanley & Fisher, Esqs.
By Thomas F. Campion, Esq.,
For Defendant Bechtel Corporation.

(2)* The Court: Gentlemen, I have listened to all the argument here, after having devoted much time during the summer and since then to the briefs filed in this matter, and I am ready to call it. As I say, all of you rely upon your brief, and I have read them, studied them, familiarized myself with all of the authorities recited therein.

The defendants here, other than the defendant, Zirpolo, have moved this Court for an order dismissing the indictments against them on the ground that trial in this Court would place them twice in jeopardy, and on the additional

---

* All figures in parentheses indicate the number of each new page of the stenographic transcript.

ground, raised by defendant, Leuty, that the State is collaterally estopped from prosecuting them. Today Leuty suggests an additional ground, a further ground that the Court should exercise supervisory power to bring to a halt this prosecution. That, though not specifically briefed, is summed up by my observation that it constitutes nothing more than that this Court should let its heart rule its head.

The defendants were first indicted in the United States District Court of New Jersey. They were charged, in many counts, with conspiring to violate and violating 18 U.S.C. code section 1952 by using or causing others to use facilities in interstate commerce to promote, manage, establish, carry on and facilitate unlawful activity, to (3) wit, violations of New Jersey's bribery statute, N.J.S. 2A:93-6. A trial was held and various judgments of convictions and acquittals were entered on jury verdicts. The judgments of conviction are presently under appeal.

The Middlesex County Grand Jury subsequently indicted the same defendants. In all essential respects, save the loss of some counts through passage of time, the State indictments charge the defendants with unlawful conduct arising out of the same facts. The only substantive difference is that the State indictments do not charge that the conduct of the defendants was interstate.

The defendant, Jacks, has also moved for dismissal of indictments in which he alone is charged with extortion and misconduct in public office. He has not submitted a brief and is apparently relying on the briefs of other counsel. I assume that his position, for the purposes of this motion, is similar to that of the other defendants; however, any argument offered by the other defendants regarding the similarity of identity of offenses charged in the State and Federal indictments cannot serve any useful purpose here.

I turn to the argument that the indictments must be dismissed on the ground that trial in this Court would place them twice in jeopardy. The controlling authority on the issue of consecutive federal and state prosecutions (4) as placing a defendant twice in jeopardy, on both federal and state constitutional levels, is *State v. Cooper*, 54 New Jersey 330 (1969). In that case the New Jersey Supreme Court upheld prosecution of the defendant under both federal and state weapons statutes, which were almost identical. In reaffirming the "dual sovereignty" theory announced in *Bartkus v. Illinois*, 359 U.S. 121, and other citations, the Court pointed out the ideological differences between the Federal government and some of the states in determining the gravity of various criminal offenses and the frustration to national or state law enforcement policy which could result from a prohibition of a second trial by the other sovereign. It concluded that a subsequent prosecution by the state did not violate the U.S. Constitution, nor could the Court find a violation of the N.J. Constitutional provision for the same reasons.

Cooper would appear to be conclusive on the issue before this Court since a "dual sovereignty" rationale certainly would apply to a federal interest in the stream of interstate commerce and a separate and distinct state interest in punishing law-breakers within its borders.

But defendants mount several attacks on *Cooper*.

First, defendants seem to imply that the New Jersey Supreme Court would not have decided *Cooper* the way it did had it done some additional research, and they urge this (5) Court to correct this oversight and reject the "dual sovereignty" theory since it has been "eroded". To sustain this contention, defendants cite several United States Supreme Court cases in which what they conveniently call the "dual sovereignty" theory was "rejected".

Rea v. U.S., 350 U.S. 214 (1956), *Elkins v. U.S.*, 364 U.S. 206 (1960) and *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). But these decisions represent only the application of the doctrine as it applies to the kind of evidence used in consecutive state-federal or federal-state prosecutions, not, as defendants would have it used here, to prevent a subsequent prosecution altogether.

Defendants next claim that, even if *Cooper* was correctly decided, it is distinguishable in that the federal statute there was designed to protect a matter of special federal concern, that is, the security of the national banking system and makes no reference to state law, while the state statute was designed to protect a distinctly different state concern, that is, protection of its citizens from dangerous weapons. However, the federal statute under which defendants were indicted here also protects a distinctly federal interest, that is, freeing interstate commerce from devices used to violate a law, the fact that the law violated was a state law is of secondary importance, whereas the state law protects (6) citizens from the corruption of their government through bribery of public servants.

Nor does the fact that the *Cooper* court was concerned with an application for post-conviction relief make its decision any less binding on this Court since it cannot be presumed, despite defendants' suggestions, that the New Jersey Supreme Court would have applied two different standards on such an important constitutional issue in the absence of some clear indication to the contrary.

Having demonstrated why the dual sovereignty doctrine should no longer be adhered to, defendants go on to suggest that there is ample precedent for a state court's rejection of the United States Supreme Court decisions before

they are expressly overruled by the highest court of the land. To soothe any apprehension this Court might have in taking so bold a step, defendants cite several state court decisions which had anticipated later Supreme Court rulings, and, specifically, an opinion by an Ohio trial court in *State v. Fletcher,* 15 M. 211, 240 N.E. 2d 905 (1958), which found double jeopardy in a situation similar to the case at bar. Defendants fail to note, however, as did the court in *Cooper, supra,* 338, that:

> "• • • As stated in *Bartkus, supra,* of the twenty-eight states which have considered the validity of successive state and federal (7) prosecutions as against a challenge of violation of either a state constitutional double-jeopardy provision or a commonlaw evidentiary rule of *autrefois acquit* and *autrefois convict,* twenty-seven have refused to rule that the second prosecution was or would be barred." Citations.

Suffice it to say that even if this Court agreed with defendants' argument for the rejection of the "dual sovereignty" theory, it would hardly be propitious to fly in the face of a recent decision squarely on point by the highest court of this state on such dubious precedent.

Putting aside all considerations of double jeopardy, defendant Leuty next contends that the state prosecution here is barred by collateral estoppel, a somewhat nebulous offshoot of *res judicata* used in many criminal cases as a supplement to double jeopardy.

Even assuming, however, that the two prosecutions here present sufficient identity of issues and that no additional evidence could be pressed at the subsequent state prosecution, application of the doctrine of collateral estoppel still requires, as Leuty concedes, at least an identity of interests, if not a strict identity of parties. And if this Court accepts

the "dual sovereignty" theory, as it is compelled to do by *Cooper, supra,* it (8) becomes immediately apparent that not only are the parties different, but the interests of each are not identical, the state's interest, therefore not being fully protected in the prior federal prosecution, thus precluding the operation of the collateral estoppel rationale.

State v. Cormier, 46 N.J. 494, 505 (1966), on which Leuty relies, cites strict identity of parties as a prerequisite to the operation of the doctrine, and indeed that case involved two successive prosecutions by the same sovereign, the state. Nor do the other cases which Leuty cites, all civil, support an extension of the doctrine to the situation *sub judice* where two different sovereigns seek to vindicate separate policies underlying their separate penal laws. Rather, the Court looks to the more direct authority of *Ferina v. U.S.,* 340 F.2d 837 (8th Cir. 1965). There, the Court expressly declined to use either double jeopardy or *res judicata* to bar a federal prosecution for obstructing justice following a state acquittal for a felonious assault, even though both charges arose out of the same activity, since the offenses had been committed against two different sovereigns.

In conclusion, this Court is convinced that the result of the granting of defendants' motion at this time would be a blow to *stare decisis* and the entire state-federal dichotomous system of criminal justice which this (9) Court has neither the authority nor the inclination to strike.

The Court, finding no merit in any of defendants' arguments, hereby denies all motions to quash the indictments. Counsel will submit an appropriate order.

APPENDIX C

Order of Appellate Division of Superior Court Denying Leave to Appeal
(Filed January 7, 1970)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-100-69
MOTION NO. M-347-69
BEFORE PART D

THE STATE OF NEW JERSEY

vs.

WALTER ZIRPOLO, ROBERT E. JACKS, COLONIAL PIPELINE CO., KARL T. FELDMAN, BEN D. LEUTY, ROWLAND TOMPKINS CORP., BECHTEL CORP., GATES CONSTRUCTION CORP., GATES EQUIPMENT CORP.,

---

Moving Papers Filed: December 24, 1969

Answering Papers Filed:

Date Submitted to Court: January 5, 1970

Date Argued:

Date Decided: January 6, 1970

ORDER

This matter having been duly presented to the Court, it is hereby ORDERED as follows:

Motion for Leave to Appeal Denied

/s/ Victor S. Kilkenny, P.J.A.D.

Witness, the Honorable Victor S. Kilkenny, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 6th day of January 1970.

Mortimer S. Newman, Jr.
Clerk of the Superior Court

APPENDIX D

Order of Supreme Court of New Jersey Denying Leave to Appeal (Filed March 22, 1970)

SUPREME COURT OF NEW JERSEY
M-167 SEPTEMBER TERM, 1969

THE STATE OF NEW JERSEY

Plaintiff-Respondent,

vs.

WALTER ZIRPOLO, et al.,

Defendants-Appellants.

This matter having been duly presented to the Court, it is Ordered that motion for Leave to Appeal is denied.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twenty-second day of March, 1971.

/s/ Irving B. Zeichner
Acting Clerk

APPENDIX E

Order of Supreme Court of New Jersey Denying Stay
(Filed April 6, 1971)

SUPREME COURT OF NEW JERSEY
M-207 SEPTEMBER TERM 1970

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

WALTER ZIRPOLO,

Defendant-Appellant.

This matter having been duly presented to the Court, it is Ordered that motion is denied but stay is granted until May 17, 1971 on condition that application for further stay is filed with the Clerk of the United States Supreme Court within 10 days from date hereof.

WITNESS, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this 7th day of April, 1971.

/s/ Irving B. Zeichner
Acting Clerk

APPENDIX F

Notice of Denial of Application for Stay by the Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543
April 23, 1971

Frederic K. Becker, Esq.
Colonial Pipeline Company
252 Madison Avenue
Perth Amboy, New Jersey 08862

RE: COLONIAL PIPELINE CO. v. NEW JERSEY
October Term, 1970

Dear Mr. Becker:

Your application for stay and the opposition thereto in the above-captioned cause were presented to Mr. Justice Brennan, who has today denied such application.

Very truly yours,

E. ROBERT SEAVER, Clerk

By: /s/ Robert N. Boyer
ROBERT N. BOYER
Assistant

jmh

cc: The Honorable George F. Kugler, Jr.
Attorney General of New Jersey
State House Annex
Trenton, New Jersey 08625

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 8 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970
No. ~~1854~~ 70-309

COLONIAL PIPELINE COMPANY,
a corporation of the State of Delaware,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, LAW DIVISION (CRIMINAL), MIDDLESEX COUNTY

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Dated: October 8, 1971

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United States v. Wilshire Oil Company of Texas, 427 F.2d 969 (10th Cir. 1970), *cert. denied* 400 U.S. 829 (1971) 4

Wheeling Steel Corporation v. Glander, 337 U.S. 562 (1949) 6

CONSTITUTION CITED:

United States Constitution

Fifth Amendment 1, 3, 4, 6, 7

Fourth Amendment 6

Fourteenth Amendment 6

STATUTE CITED:

Sherman Anti-Trust Act, 15 USC §§ 1 *et seq.* 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

DOCKET NO. 1854

COLONIAL PIPELINE COMPANY,
a corporation of the State of Delaware,
Petitioner,

vs.

THE STATE OF NEW JERSEY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF NEW JERSEY, LAW DIVISION (CRIMINAL), MIDDLESEX COUNTY [1]

In its opposition to Colonial's Petition for Writ of Certiorari, New Jersey has asserted, for the first time in this case, that Colonial may not avail itself of the protection afforded by the double jeopardy clause of the Fifth Amendment to the United States Constitution because Colonial is a corporation. This position on the part of New Jersey is not only erroneous, but is in direct contradiction of the position which the State took before the

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[1] Colonial joins in the Reply Brief In Support Of Petition For Writ Of Certiorari filed with this Court on behalf of petitioner, Ben D. Leuty, and makes that Reply Brief a part hereof as if incorporated herein in full.

Supreme Court of New Jersey in its Supplemental Memorandum filed with that Court in this case wherein it asserted, at page 3:—

> "These Defendants in the case at bar have already been once placed in jeopardy and are now in a position to urge double jeopardy."

The aforesaid Supplemental Memorandum, also at page 3 thereof, conceded that even if the initial federal indictment was ultimately voided because of the improper empanelment of the grand jury which returned such indictment, the federal trial in respect of such indictment would nevertheless have placed the defendants in the case at bar ". . . in federal jeopardy." New Jersey suggests no authority whatever for its only lately adopted position that corporate defendants may not assert the protection of the double jeopardy clause. Except for its cavalier treatment of the specific holding of the United States District Court for the Southern District of California [2] that a corporation is entitled to such protection, New Jersey suggesting that such holding was nothing more than ". . . some off-hand comments by a California District Court." [3], New Jersey fails to consider the various authorities which support the right of a corporation to assert such protection. The additional suggestions set forth in New Jersey's Brief in Opposition to the within Petition are without merit:—

1. New Jersey points out that in *Bartkus v. Illinois*, 359 U.S. 121 (1959), Mr. Justice Black included words in his

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[2] *United States v. Armco Steel Corporation*, 252 F. Supp. 362 (S.D. Cal. 1966).

[3] Brief on Behalf of New Jersey in Opposition to Petition for Writ of Certiorari, Point II, p. 16.

dissenting opinion which pertained only to natural persons. The short and obvious answer to this argument is that only a natural person, namely Alfonse Bartkus, was involved in the *Bartkus* case and it would, therefore, have been passing strange for any other form of reference to have been included in the opinion. Equally obvious, moreover, is the fact that Mr. Justice Black was using words such as "man" and "people" in their generic senses, in this context, to mean the accused. Otherwise, New Jersey could argue that women may not assert the right not to twice be placed in jeopardy by virtue of Mr. Justice Black's references to "man"; and the reference by Mr. Justice Black, *id.* at 151, to a quotation containing the word "accused" would be inexplicable. To state the argument here advanced by New Jersey is to refute it.

2. New Jersey points out that it has been held [4] that the Fifth Amendment privilege against self incrimination does not apply in favor of corporations. This is conceded. Neither the argument nor the concession, however, has any relevance to the issue presently before the Court.

The position of New Jersey is inconsistent with judicial precedent and suggests a startling departure from the generally understood application of the double jeopardy clause of the Fifth Amendment. Precedent and compelling logic require the conclusion that corporations are entitled to constitutional protection from being put twice in jeopardy for the same alleged violations of the identical statute by the same conduct.

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[4] *Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968).

ARGUMENT

New Jersey Erred In Its Argument That Corporate Defendants May Not Invoke The Protection Of The Double Jeopardy Clause Of The Fifth Amendment.

A. *Judicial precedent establishes that corporations are "persons" within the meaning of the double jeopardy clause of the Fifth Amendment of the United States Constitution and have standing to invoke its protection.*

It is well established, and no case has been found wherein the principle is challenged, that corporations may invoke the protection of the Fifth Amendment's double jeopardy clause. The ruling of this Court in *American Tobacco Company v. United States*, 328 U.S. 781, 787 (1946) must be taken to stand for this principle. In the *American Tobacco case*, the corporate petitioner raised on appeal the question of whether its convictions under different sections of the *Sherman Anti-Trust Act*, 15 USC §§1 *et seq.* violated its right not to be placed in double jeopardy. The Court ruled that petitioner had not been placed in double jeopardy, thereby implicitly holding that corporations have the right to invoke the protection of the double jeopardy clause and will receive the protection of its provisions in appropriate cases. See also *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969, 976 (10th Cir. 1970), *cert. denied* 400 U.S. 829 (1971); *United States v. American Oil Co.*, 1969 *Trade Cases*, ¶72,759 (D.N.J. 1969), *appeal dismissed* 1969 *Trade Regulation Reports*, No. 420 (3rd Cir. 1969), *cert. denied* 396 U.S. 845 (1969); *United States v. American Honda Motor*

Co., 273 F. Supp. 810, 815 (N.D. Ill. 1967); *United States v. American Honda Motor Co.*, 271 F. Supp. 979, 982 (N. D. Cal. 1967) (cases collected, *id*, at 982); *United States v. General Electric Company*, 40 F. Supp. 627 (S.D.N.Y. 1941). Even the decision of the trial court in the case at bar [5] assumes that corporations may assert the protection against double jeopardy.

In addition to these implicit holdings, lower Federal courts have specifically held that the double jeopardy clause applies to corporations. *United States v. Armco Steel Corporation*, 252 F. Supp. 364 (S.D. Cal. 1966); *United States v. H. E. Koontz Creamery, Inc.*, 257 F. Supp. 295 (D. Md. 1966) (without discussion of the question). The Courts of New Jersey have held to the same effect. *State v. Pennsylvania Railroad Co.*, 9 N.J. 194, 87 A.2d 709 (1952); *Board of Health, Borough of Hillsdale v. Tandy & Allen, Inc.*, 29 N.J. Super. 61, 101 A.2d 617 (County Ct. 1953); and see, citing *Tandy & Allen* with approval, *Englewood v. Geo. M. Brewster & Son, Inc.*, 77 N.J. Super. 248, 186 A.2d 120 (App. Div. 1962).

The determination that corporations are "persons" within the meaning of the double jeopardy clause, and thus entitled to its protection, demonstrates recognition of the fact that corporations are, for such purposes, much more than mere legal entities or "fictitious" persons. Corporate capital is an aggregation of individual capital. The corporate framework embodies the aspirations and investments of individual shareholders. An injury to the corporate entity must, therefore, inevitably produce injury to the individual shareholders. The court in *Armco*, *supra*, emphasized this point when it held:—

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[5] Appendix B to Colonial's Petition for Writ of Certiorari filed with this Court.

> "[E]ither directly or indirectly ultimately persons own all corporations and thus 'persons' must ultimately suffer whatever penalties are imposed upon the corporations[.] [I]t seems *beyond doubt to me that the constitutional jeopardy extended to 'persons' includes corporation. . . .*" *Id.* at 368 (emphasis supplied).

The decisions that corporations are protected by the double jeopardy clause and the *rationale* for so protecting them conform to a long line of United States Supreme Court cases which grant to corporations the same constitutional protections as are afforded to natural persons. Corporations are, for example, protected by the Fourth Amendment safeguards against unreasonable search and seizure and cannot have their property taken without just compensation. See *Hale v. Henkel*, 201 U.S. 43, 76 (1906). The Supreme Court has held on many occasions that corporations are "persons" within the meaning of the Fourteenth Amendment to the United States Constitution and are thus entitled to due process and to equal protection of the laws. See, for example, *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949); *Liggett Co. v. Baldridge*, 278 U.S. 105 (1928); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886).

B. *The State of New Jersey has not suggested any compelling need to deprive corporations of their constitutional right to invoke the protection of the double jeopardy clause.*

Courts have deviated from their policy of affording corporations the same constitutional protection as that afforded to natural persons in only one area, that being the Fifth Amendment right against self incrimination.

Here, the courts have apparently felt that state authorities have a compelling right to examine corporate records and documents in order to properly exercise their power to supervise and to regulate corporations. This exceptional state power was recognized by Mr. Justice Brown, writing for the Court in *Hale, supra:*—

> "There is a reserved right in the legislature to investigate its (the corporation's) contracts and find out whether it has exceeded its powers. It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose." *Id.* at 75.

Mr. Justice Brown also stated, however, *id.* at 76, that

> "In organizing itself as a collective body it (the corporation) waives no constitutional immunities appropriate to such body."

He thus emphasized that corporate loss of the Fifth Amendment privilege against self incrimination was due only to the special needs of the State. State authorities cannot demonstrate a similar compelling need to deprive corporations of their right to be free from double jeopardy and have not, in the case at bar, even suggested any such need. The right against being put twice in jeopardy for the same alleged conduct resulting in the same alleged offense does not impede the state's right to regulate and to investigate corporate activities. The vindication of such governmental authority does not, in a civilized society, permit Colonial to be subject, after being already once

indicated and tried, to the ordeal of facing both a federal retrial [6] (in respect of the *second* Federal indictment returned against it) and a new State trial on new indictments for the same alleged violations of the identical statute by the same alleged conduct.

C. *Corporations have the same needs as individuals for finality in the judicial process and are thus entitled to protection from being placed twice in jeopardy for the same alleged violations of the identical statute by the same conduct.*

One of the principal protections afforded by the Constitutional guarantee against being put in double jeopardy is the security of knowing that the State can never again retry for the same alleged offense. *Green v. United States*, 355 U.S. 184, 187-188 (1957); *see also United States v. Jorn*, 400 U.S. 470 (1971). The security created by protection from such jeopardy is as important to corporations as it is to individuals. No interest of the prosecuting authority requires dilution of the principle in the case of corporate defendants. A corporation may find it impossible to plan its future activities when it is continually faced with the threat of fresh litigation and the inevitable consequence of enormous expenditures of corporate money and energy. Colonial has already been put to a ten-week trial in the initial federal prosecution; it faces the threats of an additional federal prosecution and the New Jersey prosecution which is the subject hereof. The adverse consequences in terms of future planning and expense are very real and create a compelling reason to *preserve* the corporate right to invoke the protection of the double jeopardy clause. It is conceivable that without

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[6] Petitioner contends that such a federal retrial would be unlawful.

such protection the prosecuting authority could litigate a corporation to "death." It would controvert the purpose of the Double Jeopardy Clause as well as basic safeguards of due process of law to place such power in the hands of prosecuting authorities.

CONCLUSION

For the foregoing reasons, Petitioner prays that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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